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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

KENNETH SYNDER

Petitioner

vs.

STATE OF OHIO

Respondent

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Ohio
Eighth Appellate District, Cuyahoga County, Ohio

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SUPREME COURT of the UNITED STATES

Term October 1980

No.

KENNETH SYNDER

Petitioner

vs.

STATE OF OHIO

Respondent

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Ohio
Eighth Appellate District,Cuyahoga County,Ohio

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner Kennth Synder prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, Ohio, entered on September 21, 1980 in case number 41571 on the docket of that Court.

QUESTIONS PRESENTED FOR REVIEW

1. Does an appellate court have a duty to conduct an inquiry into possible conflict of interest resulting from multiple representation when it receives an objection to said representation prior to making its decision? Put in other words, do this Court's decisions in Glasser v. United States, 315 U.S. 60 (1942); Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, __U.S.__(1980), Wood v. Georgia, __U.S.__(1981) apply to multiple representation before an appellate court?

2. Does an appellate court have a duty to conduct an inquiry into the adequacy of representation being afforded an appellant on appeal where said appellant indicates to the Court before decision that he is not receiving adequate assistance of counsel?

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OPINIONS BELOW

The order of the Court of Appeals of Ohio, Eighth Appellate District overruling the petitioner's motion to submit a new brief is reproduced at Appendix A. The order of the Court of Appeals of Ohio, Eighth Appellate District, affirming the petitioner's convictions is reproduced at Appendix B. The order of the Ohio Supreme Court refusing to review the instant case is reproduced at Appendix C.

JURISDICTION

The order of the Supreme Court of Ohio refusing to review the instant case was entered on March 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. UNITED STATES CONSTITUTION

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of

counsel for his defense.

AMENDMENT XIV

. . .nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. OHIO STATUTES AND RULES

ORC 2911.01 Aggravated Robbery

(A) No person, in attempting or committing a theft offense as defined in section 2013.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;
(2) Inflict, or attempt to inflict serious physical harm on another;

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

ORC 2925.21 Theft of Drugs

(A) No person shall obtain any dangerous drug by attempting or committing a theft offense as defined in section 2913.01 of the Revised Code.

(B) No person shall obtain any dangerous drug by attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, and at the time of such attempt or offense or in fleeing immediately after such attempt or offense, use or threaten the immediate use of force against another.

(C) No person shall obtain any dangerous drug by attempting or committing a theft offense as defined in section 2913.01 of the Revised Code and at the time of such attempt or offense or in fleeing immediately after such attempt or offense have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control, or inflict or attempt to inflict serious physical harm on another.

ORC 2923.03 Complicity

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

ORC 2945.59 Proof of defendant's motive

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Rule 16
of the Ohio Rules of Criminal Procedure

(g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the

witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist, the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

STATEMENT OF THE CASE

On July 28, 1977, Martha Harber and two men robbed the Upson Pharmacy. The case remained unsolved until November 4, 1977, when Ms. Harber was arrested for passing a forged prescription. In return for having several charges dropped and being allowed to remain on probation on another case, Ms. Harber told the Euclid Police that she, Kenneth Synder (the petitioner) and Thomas Hurley robbed the Upon Drug Store on July 28, 1977. Based upon these statements of Ms. Harber, the Euclid Police secured an arrest warrant for the

petitioner, who was arrested on November 4, 1977. On November 7, 1977, the petitioner's mug shot was shown to three witnesses of the robbery, two of whom tentatively identified him as one of the robbers. The petitioner was then indicted by the Cuyahoga County Grand Jury for two counts of Aggravated Robbery (ORC §2911.01) and one count of Theft of Drugs (ORC §2925.21).

The testimony at trial established that on July 28, 1977, two men entered the Upson Pharmacy at 1:30 p.m. One man, dressed in a hat and ski mask and armed with a knife, robbed Berta Kornfeind of the money in the cash register and then herded Ms. Kornfeind and another employee, Barbara Shebe, into the pharmacy, while the other man, dressed in a ski hat and armed with a gun, robbed the pharmacist of drugs.

The question of identity of these men was the key issue of the trial. Barbara Shebe, when asked if anyone in the courtroom was involved in the robbery, answered that the petitioner looked

"a little bit like the one that was up front" who had the knife (T18-19). She testified that she was very upset during the robbery (T23) and that she only looked briefly at the man with the gun who wore a cap (T22). She further testified that the man up front with the knife was wearing a ski mask (T24). During cross-examination, Ms. Shebe said she was positive that she saw the petitioner in the Upson Pharmacy that day (T25). After testifying that the petitioner was the man with the knife twice, she contradicted herself at the very end of her testimony and testified that she was sure that he was the man that had the gun (T26) although she had previously testified that she had not really seen the face of the man with the gun (T21).

Berta Kornfeind testified that she worked the front counter at the Upson Pharmacy on the day in question and that she was robbed at knife point of the contents of the cash register. She testified that the petitioner could be the person with the knife, but she remembered that person as

being shorter and more slender (T30). She admitted that she had a hard time remembering people (T38), that she had been told where Synder would be sitting in the courtroom (T34), and that she had been shown his picture on the morning of her testimony (T35). She further testified that the man with the knife was wearing a stocking cap over his face and that she had only seen his face for a split second (T39,40). Otherwise, all she could see were the eyes. After trial, it was learned that Ms. Kornfeind has glaucoma and can only see things in front of her or within a few inches of her (T39).

Alex Saferin, the pharmacist, whowas robbed of various drugs, testified that he couldn't identify the man with the knife, but he thought Thomas Hurley resembled the man with the gun (T50), although that man had a stocking over his face (T61). But he did specifically testify that Kenneth Synder was not the man with the gun (T61) thereby contradicting Barbara Shebe's testimony.

Martha Harber, an admitted participant in the

robbery, also testified for the state. Prior to her testimony, she was appointed an attorney, Robert Ruggeri, who secured immunity for her testimony. Thereafter, she testified that the petitioner and Thomas Hurley were involved in the robbery. Ms. Harber's credibility was attacked during cross-examination and it was revealed that she held a grudge against the petitioner for some trouble she and her boyfriend had with the federal authorities. It was further brought out that her boyfriend matched the description of one of the robbers given to the police on the day of the robbery, thereby raising the possibility that Ms. Harber's testimony against the petitioner was merely a means to protect her boyfriend.

The defendant presented an alibi defense. Several witnesses testified on his behalf that at the time of the robbery at Upson Pharmacy, he was on the other side of town working. Two Secret Service Agents were prepared to corroborate this testimony, but they were not properly subpeonaed and their subpeonas were quashed by the trial

court. The defense also presented evidence which proved that the petitioner's convertible had been totaled three weeks prior to the robbery, thereby directly contradicting the testimony of Martha Harber that she and the petitioner had driven to the Upson Pharmacy in his convertible. The defense further presented a witness who had seen the two robbers exit the store, without their masks on, and who testified that she could not identify the petitioner as being one of the two men she saw.

The state presented two witnesses on rebuttal. Ruth Ann Arendt testified that she had problems with one of the defendant's witnesses during the trial. James Trobates testified that the defendant never offered to take a lie detector test. Thereafter, the defendant was found guilty of all the charges and sentenced according to law.

After trial, new evidence was uncovered which supported the defense position that the petitioner was innocent. First, the petitioner took a polygraph test and passed. See Appendix D. Second,

a witness was found who had seen the two robbers leave the pharmacy. A little boy was outside the pharmacy when the two men left and he saw their full faces, after which he entered the pharmacy and informed the employees that everything was over. Neither the existence of this witness, nor his name and address were provided to the defense before trial, nor did he testify at the trial. After trial, the boy was found and shown pictures of the petitioner and Martha Harber's boyfriend. The young boy is willing to testify that the petitioner was not one of the two men he saw on July 28, 1977 and that Gary Kline resembles one of the two men he saw. However, a motion for new trial based on this information was denied without a hearing by the trial court due to procedural errors committed by the petitioner's counsel.

Thereafter, Robert Ruggeri, the same attorney who represented the state's key witness, Martha Harber, at the petitioner's trial, was appointed to represent him on appeal. After an appeal brief

was filed on his behalf, the petitioner became disenchanted with Mr. Ruggeri's representation and filed a motion with the Court of Appeals requesting that he be allowed to file another brief, prepared by another attorney, raising additional issues. (See Appendix E) This motion was denied without a hearing and the Court of Appeals ultimately overruled all assignments of error raised by Mr. Ruggeri. The petitioner appealed to the Ohio Supreme Court which refused to consider his case. The petitioner is now before this Court seeking a review of this case.

REASONS FOR GRANTING THIS WRIT

I. THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL ON APPEAL BECAUSE OF A CONFLICT OF INTEREST INVOLVING HIS APPOINTED COUNSEL. THE FAILURE OF THE COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, TO CONDUCT AN INQUIRY INTO THE POSSIBILITY OF A DISQUALIFYING CONFLICT OF INTEREST AFTER THE PETITIONER RAISED THE POSSIBILITY OF A CONFLICT OF INTEREST REQUIRES THIS COURT TO REMAND THE CASE BACK TO THAT COURT. THE PETITIONER WAS PREJUDICED BY THE REPRESENTATION OF HIS COURT-APPOINTED COUNSEL DUE TO THE CONFLICT OF INTEREST.

In Ohio, a defendant who has been convicted

of a criminal offense has the right to appeal that conviction to the appropriate Court of Appeals. Said appeal is the only appeal of right allowed by Ohio, the rest being discretionary appeals. Hence, for that appeal, an accused has a constitutional right to appointed counsel. Griffin v. Illinois, 351 U.S. 12 (1956). And this constitutional right to counsel also includes the "correlative right to representation that is free from conflicts of interest." Wood v. Georgia, __U.S.__(1981); Cuyler v. Sullivan, __U.S.__ (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).

In the instant case, the petitioner was appointed counsel for appeal who was the same attorney who had represented the adverse interests of the petitioner's alleged accomplice at the petitioner's trial. This multiple representation of the petitioner and his alleged accomplice turned state's star witness clearly constitutes a conflict of interest.

Further, the petitioner raised this conflict

of interest to the Court of Appeals. Upon receiving a copy of the brief filed on his behalf with the Court of Appeals, the petitioner consulted another attorney who pointed out several deficiencies in the brief. Deciding that his court-appointed counsel was not representing his best interests, the petitioner filed with the Court of Appeals a motion indicating his dissatisfaction with his appointed counsel's representation and raising the fact that there existed a conflict of interest. (See Appendix E) The petitioner requested that he be allowed to file another brief with the Court which would raise six additional issues, a copy of which accompanied the motion. (See Appendix F) The Court of Appeals overruled the petitioner's request, without a hearing and subsequently affirmed the petitioner's convictions. The Ohio Supreme Court has refused to review the decision of the Court of Appeals.

This Court has repeatedly held that where an accused objects to multiple representation by his

counsel prior to trial, the trial court must conduct an inquiry into the alleged conflict of interest and that where the trial court fails to conduct such an inquiry, reversal is mandated. Wood v. Georgia, supra. The petitioner believes that this legal principle applies equally to appellate courts and that therefore the failure of the Court below to make an inquiry into the alleged conflict of interest requires this Court to remand the instant case back to the Court of Appeals, Eighth Appellate District, for consideration of the petitioner's supplemental appeal brief.

The petitioner also believes that he was prejudiced by the conflict of interest of his court-appointed counsel. The brief filed by his court-appointed attorney was deficient in many respects. Particularly prejudicial was the fact that several substantive issues were not raised in the brief which should have been (See Appendix F). The Court of Appeals in its opinion, recognized the inadequacy of the brief by its

summary disposition of the issues raised in that brief, including the disposing of several issues on the ground that they had not been properly raised on appeal. Because the petitioner was prejudiced by the conflict of interest of his court-appointed appellate attorney, this Court should remand the case to the Court of Appeals for consideration of the petitioners' supplemental brief and issues raised therein.

II. THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE ADEQUATE ASSISTANCE OF COUNSEL BOTH AT TRIAL AND ON APPEAL. THE COURT OF APPEALS SHOULD HAVE CONDUCTED AN INQUIRY INTO THE PETITIONER'S ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL RAISED PRIOR TO THEIR DECISION.

Every defendant in a criminal prosecution has a constitutional right under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution to have the effective assistance of counsel at trial. Powell v. Alabama, 308 U.S. 444 (1940). This right to counsel was defined by the Sixth Circuit Court of Appeals in Beasley v. United States, 491 F. 2d 687 (6th Cir. 1974)

as follows:

> We hold the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. Johns v. Perini, 440 F. 2d 577, 579 (6th Cir. 1971); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). King v. Beto, 429 F. 2d 221, 225 (5th Cir. 1970) cert denied 401 U.S. 936, 91 S. Ct. 921, 28 L. Ed. 2d 216 (1971); Chalk v. Beto, 429 F. 2d 225, 227 (5th Cir 1970). Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interests, undeflected by conflicting considerations. Glasser v. United States 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 860 (1942); McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441 25 L. Ed 2d 763 (1970). Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner. Reece v. Georgia, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77 (1955); Wilson v. Phend, 417 F. 2d 1197 (7th Cir 1969).

The petitioner believes that since the right

to counsel is so important to a criminal defendant, that when an accused raises the issue of the competency of representation to a court before trial or before a decision on appeal, that the court must conduct an inquiry into counsel's adequacy.

Further, the petitioner believes that he was denied the effective assistance of counsel at trial and on appeal for the following reasons:

(1) The petitioner was denied a fair trial and the effective assistance of counsel by the failure of his trial counsel to file a pretrial motion to suppress the eyewitness identification testimony.

The only evidence tying the petitioner with the July 28, 1977 robbery of Upson Pharmacy was the testimony of an alleged accomplice and the somewhat shaky identification of two witnesses. Since Ohio requires corroboration of an accomplice's testimony before there can be a conviction (ORC 2923.03(D)), the suppression of the

identification testimony in the instant case was a critical issue in the case. Therefore, counsel owed his client a duty to file a pretrial motion to suppress identification testimony.

(2) The petitioner was denied a fair trial and the effective assistance of counsel by the failure of his counsel to request an in-camera inspection of Martha Harber's prior written statement.

Rule 16 of the Ohio Rules of Criminal Procedure provides that after a witness has testified on direct examination, defense counsel may request an in-camera inspection of all prior written statements for a determination if there are any material inconsistencies between the statement and the testimony. See also State v. White, 15 O St. 2d 146 (1968); Brady v. Maryland, 373 U.S. 83. Since Martha Harber's testimony was so critical to the instant case, any inconsistencies between her prior written statement and her testimony could have been used to impeach her already shaky credibility and would have been an important

ingredient to the jury's determination of innocence or guilt. Accordingly, the failure of the defense counsel to request an in-camera inspection of Martha Harber's prior written statement was a violation of his duty to put the state to its proof.

(3) The petitioner was denied a fair trial and the effective assistance of counsel by the failure of his counsel to properly investigate the facts surrounding the case and to present all substantial defenses before the jury.

In the instant case, it is clear that the petitioner's trial counsel failed to properly investigate the facts surrounding the case. Had the trial counsel properly investigated the facts, he would have found, as was found after trial, the boy who would have testified that the petitioner was not one of the robbers and the fact that Ms. Kornfeind has glaucoma. Had this evidence been presented to the jury, it is likely that it would have affected their decision.

(4) The defendant was denied a fair trial and the effective assistance of counsel by the failure of the defense counsel to present a substantial defense.

In the instant case, the petitioner's main defense was alibi. Although defense counsel presented an alibi defense through several witnesses, he failed to properly subpeona two witnesses who would have added great credibility to the alibi defense. Two Secret Service agents were prepared to testify that they saw petitioner on the west side of Cleveland on the afternoon of July 28, 1977. Such testimony was clearly crucial. However, the defense counsel did not properly subpeona these two witnesses and their subpeonas were quashed at the request of the U.S. Attorney. Accordingly, the failure of the defense counsel to properly subpeona critical alibi witnesses deprived him of a substantial defense.

(5) The petitioner was denied the effective

assistance of counsel by the failure of counsel to properly file a Motion for New Trial.

A Motion for New Trial based upon newly discovered evidence was filed on the petitioner's behalf. The trial court denied the motion because it was not properly filed. The petitioner believes that the failure of his counsel to properly file a motion for new trial constitutes ineffective assistance of counsel.

(6) The petitioner was denied a fair trial and the effective assistance of counsel when his attorney did not pursue the possibility of a lie detector test for the defendant.

The petitioner prior to trial desired to take a lie detector test. Since the Ohio Supreme Court has ruled that under certain conditions the results of a lie detector test are admissible, State v. Souel, 53 O St. 2d 123 (1978), defense counsel should have pursued this possibility. The failure to do so deprived the petitioner of a substantial defense particularly since he

passed a lie detector test taken after the trial.

(7) The petitioner was denied a fair trial and the effective assistance of counsel by the failure of his counsel to object to and raise on appeal the admission of irrelevant, immaterial and improper testimony.

The issue before the jury in the instant case was whether or not the petitioner was involved in the robbery of the Upson Pharmacy on July 28, 1977. Unfortunately for the petitioner, the jury's attention was continuously diverted from this crucial issue by irrelevant, immaterial and improper testimony. During the trial the following issues were presented to the jury:

(a) That Kenneth Synder's girlfriend was shot in July, 1977, by his co-defendant Thomas Hurley (T208-15, 244-60);

(b) That Joanna Hirko, a witness for the petitioner and Charlotte Harch, a witness for co-defendant Hurley, were involved in the

robbery (T214);

(c) That Joanna Hirko was under indictment and that she and the petitioner were involved in the sale of drugs (T254, 261-2);

(d) That Joanna Hirko paid to bail Thomas Hurley out (T214);

(e) That Joanna Hirko gave the state's witnesses a hard time (T183, 186-89);

(f) That Joanna Hirko got into an argument with a deputy during the trial (T306-8);

(g) That the petitioner had a more extensive police record than he admitted to (T291);

(h) That Joanna Hirko was engaged to Kenneth Synder (T270);

(i) That Joanna Hirko testified for the petitioner in return for the petitioner testifying for her at her upcoming trial (T270);

(j) That niether the petitioner nor his co-defendant ever asked Detective Trobates for a lie detector test.

The petitioner believes these lines of

questioning, testimony and argument were improperly presented to the jury and thereby deprived him of a fair trial because these issues were immaterial and irrelevant, State v. Doll, 24 O St. 2d 130; they amounted to an attack on his character, State v. Lytle, 43 O St. 2d 391 (1976); they tended to show he was guilty of other crimes in violation of ORC §2945.59(D) and they amounted to an attempt by the prosecution to communicate to the jury by innuendo, State v. Williams, 51 O St. 2d 112 (1977).

(8) Petitioner's appellate counsel failed to raise on appeal the fact that his conviction for the Aggravated Robbery of Barbara Shebe violates due process.

Since robbery is essentially a theft offense, the number of robberies an accused can be convicted of must correspond to the number of thefts committed and not to the number of people against whom force was used. In the instant case, the testimony established that money was taken from Berta Kornfeind at the cash register and

drugs were taken from Alex Saferin at the pharmacy. Since there was only two thefts, and since there was no testimony that anything was taken from Barbara Shebe, the state failed to prove its case beyond a reasonable doubt.

(9) Petitioner's counsel failed to request that the trial court instruct the jury on the weight to be given to an accomplice's testimony.

The state's key witness at the petitioner's trial was an alleged accomplice who was granted immunity from prosecution in return for her testimony. It also came out that Martha Harber was never charged with several crimes she admitted committing and that she was continued on probation in another case, because of her testimony.

The petitioner believes that the jury should have been instructed as a matter of law that an accomplice's testimony is inherently suspect and untrustworthy and that the state had to corroborate the testimony by independent evidence or they were required to acquit. Since in the

instant case, the jury was not informed of the tests to which an accomplice's testimony must be subjected, the petitioner was not afforded a fair trial.

III. THE PETITIONER WAS DENIED A FAIR APPEAL BY THE FAILURE OF THE COURT OF APPEALS TO CONSIDER HIS SUPPLEMENTAL BRIEF.

The due process clause of the Fourteenth Amendment to the United States Constitution requires a state to make available to an accused some form of appellate procedure for a review of claimed violations of rights granted him under the United States Constitution. Frank v. Magnum 237 U.S. 309. The Court of Appeals violated that principle by not considering the petitioner's supplemental issues. The Court's actions also violated the principle that "justice must satisfy the appearance of justice." In Re Murchison, 349 U.S. 133 at 136.

RELIEF REQUESTED

The issues raised in the instant petition are similar to the issues decided by this Court

in Wood v. Georgia, __U.S.__(1981). The petitioner urges this Court to summarily remand this case to the Court of Appeals of Ohio, Eighth Appellate District, for reconsideration of its decision in light of Wood v. Georgia, supra.

CONCLUSION

The petitioner emphatically states that he is innocent. He was not convicted because of the evidence against him, but rather because of the shoddy work of his attorneys. He has passed a polygraph test and at least three credible witnesses can corroborate his defense, but were not presented at trial due to the ineffectiveness of his counsel. All he wants is to have a fair determination of his case. The Court of Appeals of Ohio have affirmed his convictions without considering serious legal questions which should have been raised by his court-appointed attorney. The injustice of his situation caused by members

of the bar cries out for this Court to grant the instant petition.

Respectfully submitted,

CHRISTOPHER D. STANLEY
611 Rockefeller Building
Cleveland, Ohio 44113
(216)771-0811

Attorney for Petitioner

SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certrioari have been served on John T. Corrigan, attorney for Respondent, at the Justice Center, 1200 Ontario, Cleveland, Ohio 44113, on this _____day of May, 1981. I further certify that all parties required to be served have been so served.

CHRISTOPHER D. STANLEY

APPENDIX

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERLAD E. FUERST, CLERK OF COURTS

APPENDIX A

STATE OF OHIO

Appellee

-vs-

KENNETH SNYDER

Appellant

Court of Appeals No. 41571

Lower Court No. CR 35902
A & B

Motion No. 50155

JOURNAL ENTRY

Motion by appellant for leave to file brief instanter and request for new oral hearing overruled. Appeal heard on its merits July 22, 1980. Exc.

SILBERT, P.J.,

STILLMAN, J.,

BROWN, J., CONCUR

Presiding Judge

Joseph H. Silbert

(Silbert, Retired Judge sitting by assignment.)

APPENDIX B

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 41571

STATE OF OHIO — APPEAL FROM

Appellee — COMMON PLEAS COURT

-vs- — No. CR 35902 A & B

KENNETH SNYDER

Appellant — JOURNAL ENTRY AND OPINION

Date: Sept. 11 1980

Silbert, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This is a delayed appeal from the Court of Common Pleas, Criminal Division. Kenneth R. Snyder, defendant-appellant, appeals his conviction of two counts of aggravated robbery and one count of theft of drugs.

On July 28, 1977, Upson Pharmacy was robbed by two armed assailants. On December 14, 1977, appellant was indicted on charges arising from the robbery. He pled not guilty on January 13, 1978, and the case, together with that of codefendant Thomas P. Hurley, was subsequently tried to a jury.

Trial began on May 3, 1978. The State first presented the testimony of the three employees who were present in the pharmacy on the day of the robbery. Barbara Jane Skebe testified that she was approached by a man with a gun as she was checking in an order of prescription drugs at the rear of the store, that the man spoke to her and then proceeded into the prescription room behind her, that she proceeded to the front of the store to discuss the matter with another employee,

and that she was then accosted by a man with a knife; Ms. Skebe positively identified appellant as one of the two assailants, first indicating that she was unsure as to whether he was the man with the knife or the gun and finally concluding that he was the man with the gun. Berta Kornfeind testified that she was approached by a man "with a big long knife pointed at (her) stomach" (Tr. 28) as she was standing at the store's front counter, that the man robbed the cash register and then proceeded to escort her and the rapidly approaching Ms. Skebe to the rear of the store, and that she was present in the prescription room when the man with the gun obtained the drugs; Ms. Kornfeind identified appellant as one of the two assailants, indicating that he was the man with the knife. Both women also testified that they had identified appellant during photographic displays conducted shortly after the incident. Alex Saferin, a registered pharmacist, testified that he was approached by a man with a gun as he

was working in the prescription room at the rear of the store, that the man specifically asked for and obtained "Class 2" drugs, and that he saw, for only a few moments, a man with a knife; Mr. Saferin identified Hurley as the man with the gun and did not identify appellant.

The State then presented the testimony of Martha Ruby Harber. Ms. Harber, who had been granted immunity pursuant to R.C. §2945.44, testified that on July 28, 1977, she, appellant and Hurley drove to Euclid in appellant's car, a two-door convertible, to rob a drugstore; she testifed that appellant and Hurley, armed with two guns and a ten-inch knife, entered the store and that she remained in the car while they perpetrated the robbery.

Lastly, the State presented the testimony of Detective James Trobenter. Detective Trobenter testified that he showed fifteen photographs to the store's employees in November 1977; he testified that Ms. Skebe positively identified Hurley

and tentatively identified appellant, that Ms. Kornfeind identified appellant, and that Mr. Saferin identified Hurley. [1]

Appellant presented the testimony of two alibi witnesses and testified on his own behalf. He testified that the blue, two-door convertible he had been driving had been "totaled" prior to the robbery and introduced a police report to that effect; he also testified that he had requested that police administer a lie detector test and that they refused to do so. Appellant also presented the testimony of Susan Reichert, a bystander who witnessed the getaway and who testified that the getaway car was a large, avocado green hard top.

In rebuttal, Detective Trobenter testified that neither defendant had requested the police administer lie detector tests.

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1 Detective Trobenter also testified that the 15 photographs included one of Gary Kline, Ms. Harber' boyfriend. During the trial, appellant suggested that Mr. Kline had perpetrated the robbery and that Ms. Harber's implication of appellant was a lie to protect Mr. Kline.

On May 11, 1978, the jury convicted appellant of two counts of aggravated robbery and one count of theft of drugs. [2] On May 25, 1978, appellant moved for a new trial, contending that the verdict was unsupported by sufficient evidence and contending that the State's failure to disclose the favorable evidence testified to by Susan Reichert denied him a fair and impartial trial; on June 22, 1978, the court overruled the motion. On November 27, 1978, appellant moved for a new trial, contending that newly discovered evidence [3] would result in a verdict of not guilty; on January 4, 1979, the court overruled the motion.[4]

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2 On August 21, 1978, the court imposed three concurrent sentences of four to 25 years.

3 In the motion, appellant asserted:
(1) "that Mrs. Kornfeind will testify, under oath, that she has glucoma(sic) and can't see anything unless she is inches away from it,"
(2) that appellant underwent a 2½ hour polygraph test on July 19, 1978, and that the results were favorable to him.
(3) that Martha Harber "violently objected to (taking a polygraph test) and to this date refuses to do so,"

In his delayed appeal, appellant assigns five errors:

"ASSIGNMENT OF ERROR NO. 1

"Court erred in not compelling state to provide complete list of all witnesses especially those tending to produce exculpatory evidence.

"ASSIGNMENT OF ERROR NO. 2

"The Court committed serious prejudicial error in allowing the state to go beyond the scope of cross-examination of a witness and beginning a new line of questioning under the guise of re-direct

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(4) that "an inmate of the county jail...is now willing to testify, under oath, that Martha Harber told him, to his face, that (appellant) did in fact NOT commit the robbery in question", and (5) that a young boy who had witnessed the getaway and whose parents had reluctantly agreed to his testifying "has stated unequivocally that (appellant was NOT either one of the 2 men who came out of the store."

4 On January 10, 1979, appellant filed a motion for reconsideration; on January 31, 1979, the court overruled the motion. On February 14, 1979 appellant filed "additional information to be added to the motion for reconsideration," asserting that three masked and armed gunmen using the modus operandi testified to by Ms. Harber had recently robbed the Upson Pharmacy, that the pharmacy's employees had again implicated appellant and Hurley, that Hurley had been incarcerated and that appellant had an airtight alibi. On March 21, 1979, the Court overruled the motion with additional information.

examination.

"ASSIGNMENT OF ERROR NO. 3

"The testimony of the unindicted accomplice Martha Harber was not corroborated by any probative evidence.

"ASSIGNMENT OF ERROR NO. 3A

"The Court erred in not striking the testimony of Mrs. Kornfeind, or at the very least, her tainted identification of the defendant Kenneth Snyder.

"ASSIGNMENT OF ERROR NO. 4

"Court erred in not granting defendant Snyder a new trial based upon newly discovered evidence.

"ASSIGNMENT OF ERROR NO. 5

"The verdict reached is against the weight of the evidence and not that required to support a conviction."

These assignments of error are without merit.

In his first assignment of error, appellant, relying on Crim. R. 16(B)(1), contends that the State committed prejudicial error by disclosing only Ms. Reichert's name and by failing to disclose the substance of her testimony. Crim. R. 16(B)(1) provides:

"(f) Disclosure of evidence favorable to defendant. Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetration provisions of subsection (B)(1)(e) apply to this subsection."

Ms. Harber did not testify as to the color of the getaway car and Ms. Reichert's general descriptions of the fleeing assailants were consistent with the state's evidence. Appellant, moreover, fully cross-examined Ms. Harber at the trial and himself introduced Ms.Reichert's testimony; i.e. appellant failed to demonstrate prejudice. Accordingly, we overrule the first assignment of error.

In his second assignment of error, appellant contends that the court committed prejudicial error in permitting the State, during redirect examination to elicit Ms. Harber's opinion that appellant looked "wired" and "spacey" on the day of the robbery. The control of redirect examination is a matter within the sound discretion of

the trial court. State v. Wilson (1972) 30 Ohio St. 2d 199. Because appellant himself cross-examined Ms. Harber as to his appearance on the day of the robbery, we cannot conclude that the trial court abused its discretion in permitting the State's limited questioning. Accordingly, we overrule the second assignment of error.

In his third assignment of error, appellant, relying on State v. Myers (1978) 53 Ohio St. 2d 74, contends that the discrepancies in the identification testimony rendered it insufficient to corroborate Ms. Harber's testimony. Appellant failed to move for suppression of identification testimony pursuant to Crim. R. 12(B); moreover, he fully cross-examined each eyewitness at the trial and failed to establish that their identifications had been tainted. The issues which appellant raises herein reflect upon the credibility of the eyewitnesses, not upon the admissibility of their identifications, and are for resolution by the trier of fact. State v. DeHass

(1967), 10 Ohio St. 2d 230. Because both Ms. Skebe and Ms. Kornfeind identified appellant during photographic displays and during trial, their testimony is sufficient to corroborate that of Ms. Harber. Accordingly, we overrule the third assignment of error.

In his fourth assignment of error, appellant contends that the trial court committed prejudicial error in failing to grant his motion for a new trial. Crim. R. 33(B) provides:

> "Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period."

Crim. R. 33(C), moreover, requires that the movant sustain by affidavit any claim of "surprise

which ordinary prudence could not have guarded against," and Crim. R. 33(A)(6) requires that he produce affidavits of the prospective witnesses. Appellant did not file his motion within 120 days after the jury's verdict. He did not produce affidavits to demonstrate that he was unavoidably prevented from discovering the evidence discussed therein, nor did he substantiate the existence of that evidence with affidavits of prospective witnesses. According, we overrule the fourth assignment of error.

In his fifth assignment of error, appellant contends that the evidence was insufficient to support his convictions. Our careful review of the record reveals that the State introduced evidence to support each element of the offenses of aggravated robbery [5] and theft of drugs.[6] The discrepancies between the State's evidence and that introduced by appellant are for resolution by the trier of fact. State v. DeHass, supra. Accordingly, we overrule the fifth assignment of error.

The judgment of the Court of Common Pleas is affirmed.

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5 R.C. 2911.01 provides:

(A) No person, in attempting or committing a theft offense as defined in section2913.01 of the Revised Code of in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

(2) Inflict, or attempt to inflict serious physical harm on another."

6 R.C. 2925.21 provides:

(A) No person shall obtain any dangerous drug by attempting or committing a theft offense as defined in section 2913.01 of the Revised Code.

(B) No person shall obtain any dangerous drug by attempting or committing a theft offense as defined in section 2913.01 of the Revised Code and at the time of such attempt or offense or in fleeing immediately after such attempt or offense, use or threaten the immediate use of force against another.

(C) No person shall obtain any dangerous drug by attempting or committing a theft offense as defined in section 2913.01 of the Revised Code and at the time of such attempt or offense or in fleeing immediately after such attempt or offense have a deadly weapon or dangerous ordnance as defined by Section 2923.11 of the Revised Code on or about his person or under his control, or inflict or attempt to inflict serious physical harm on another.

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO)
)
City of Columbus)

1981 TERM

To wit: March 11, 1981

State of Ohio)
Appellee)

-vs-

KENNETH SYNDER
Appellant)

NO. 81-46

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS for Cuyahoga County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion fee $20.00, paid by Christopher D. Stanley.

I Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this day of 19

_____ Clerk

_____ Deputy

APPENDIX D

FARRELL AND ASSOCIATES
21455 Riviera Drive
Fairview Park, Ohio 44126

734-4473

July 19, 1978

Mr. Robert A. Ruggeri
Attorney at Law
1276 West 3rd St.
635 Marion Bldg.
Cleveland, Ohio 44113

Dear Sir:

On July 19, 1978, a Specific Polygraph Examination was administered to a Mr. Kenneth Snyder, your client. The purpose of the Examination was to find out if Mr. Snyder had any involvement in the Aggravated Robbery of the Upson Pharmacy on 7-28-77.

A Lafayette 4-channel instrument was used, along with the Arther technique in question formulation. The following is a list of the relevant questions that were asked of Mr. Snyder during the examination and his answers.

Do you know for sure who robbed the Upson drug store? (NO)

Did you rob the Upson drug store? (NO)

Were you with Tom Hearly at the Upson drug store on 7-28-77? (NO)

At gunpoint, did you force the Upson store clerk to give you money and drugs? (NO)

Have you now told the entire truth about the Upson drug store robbery? (YES)

Chart analysis indicated that there was NO deception noted to any of the relevant questions. It is the opinion of this office that Mr. Snyder was being truthful when he answered the relevant questions.

Yours truly,

Kevin R. Farrell
A.C.P.
Certified Polygraphist

APPENDIX E

IN THE COURT OF APPEALS OF OHIO
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	
		CASE NO. 41571
Plaintiff-Appellee	)	
		Lower Court 35902
-vs-	)	
		MOTION FOR LEAVE TO
KENNETH SYNDER	)	FILE BRIEF INSTANTER
		AND FOR NEW ORAL
Defendant-Appellant	)	ARGUMENT

Comes now the appellant and moves this Court for leave to file a new brief and to have a new oral argument in the above titled case, for the following reasons:

1) The defendant was indicted by the Cuyahoga County Grand Jury for two counts of Aggravated Robbery and one count of Theft of Drugs. One of the witnesses at trial was an alleged accomplice of the defendant, Martha Harber, who was represented at trial by Robert Ruggeri.

2) The defendant's appeal counsel is the same Robert Ruggeri who represented the defendant's accomplice at trial. The defendant believes that

this dual representation is a conflict of interest which requires this Court to allow the defendant to file a new brief in the instant case in addition to the brief already on file.

3) The defendant has retained a new lawyer and a copy of the brief which he wishes to file is attached hereto.

WHEREFORE, the defendant moves this Court for leave to file his new brief and for new oral argument.

_____
Kenneth Snyder

APPENDIX F

ISSUES ATTEMPTED TO BE RAISED BY PETITIONER IN THE COURT OF APPEALS

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